Supreme Court, U.S.
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No. 09-608

IN THE
Supreme Court of the United States

SINCERELY YOURS, INC., ET AL.,
Petitioners,

v.

BERTRAM COOPER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents the question of whether parties announcing an ideological objection to government speech, policy, or conduct they have perceived may thereby gain access to federal court to litigate their Establishment Clause grievance. "It is inevitable that government will adopt and pursue programs and policies" that are "contrary to the profound beliefs and sincere convictions of some of its citizens." *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). If the correspondingly inevitable "objection" and "offense" of ideologically affected citizens constitutes an injury under Article III, then the doors to federal court truly are open to all partisans seeking a forum to air their complaints. But this is precisely the arrangement this Court condemned in *Valley Forge* when denying "injury" status to this ubiquitous form of offense.

Respondents' interpretation of *Valley Forge* as merely imposing a "direct observation" requirement on offended observers, rather than excluding their offense altogether from the category of "injury" under Article III, misses the obvious and reads into that case a rule of pointless formality. Such an artificial hurdle could be easily surmounted by any party simply by arranging for direct observation of the matter sought to be challenged. Moreover, respondents' interpretation implies that the Court merely imposed a prudential mechanism to inconvenience and thus thin the ranks of potential plaintiffs, rather than doing what the Court said it was doing: applying the "rigorous Art. III

requirements" to exclude non-injury from court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

Respondents' testimony merely that they "object" to the church's displays in its CPU cannot qualify them for standing under Article III if the "rigorous requirements" of that provision are to serve any meaningful function.

On the merits, it is undisputed that the church is the sole source of the speech to which respondents object, that the church's speech describes its own outreaches, and that the church presents that speech on its own property. The USPS not only did not encourage or participate in that speech, it even arranged placement of a prominent sign on the transaction counter disclaiming its support for the church's messages. Pet. at 6. Yet Respondents incomprehensibly characterize the Second Circuit's classification of the church's speech as governmental as "unassailable," Opp. at 12, and assert that the church's challenge to the lower court's Establishment Clause finding "borders on frivolous." *Id.* at 23.

Yet respondents never back up those characterizations. In fact, they entirely avoid discussion or even mention of any part of the church's critique of the Second Circuit's unprecedented classification methods. The court of appeals wholly disregarded this Court's repeated example of the requisite method for assessing contested speech under the Establishment Clause, and reached a result in conflict with several First

Amendment standards. Respondents' conspicuous evasion of the church's arguments seems an implicit concession.

This Court should grant review.

REPLY TO FACTUAL DISCUSSION

Throughout their brief, respondents rely upon insinuating allegations that the record evidence does not support. For instance, respondents state that they are "offended" by the church's speech, Opp. at 6, that they are "directly affected" by that speech, *id.* at 16, that they "unavoidably encounter" the church's displays, *id.* at 1, and that they "cannot avoid being proselytized" at the church's facility. *Id.* at 19. None of this can be found in the record. The evidence shows only that respondents "object" to the church's displays – nothing more. Pet. at 27. There is no evidence that respondents are "offended" by any of the content of the materials found at the CPU, assuming they have even taken it upon themselves to read any of that content -- a fact which is not in evidence, either.

Respondents also imply the church conducts something like an evangelistic enterprise directed at patrons of the CPU. But respondents' incessant use of the characterization "proselytizing" as applied to the church's speech (Opp. at i, 1, 5, 6, 12, 13, 19, 22, 23) is simply gratuitous. None of the speech presented in the CPU falls into this category; nor have respondents given any justification for that description. Elsewhere, respondents oddly (and repeatedly) characterize the church as engaged in religious or proselytizing "activities" or "practices" at

the CPU (Opp. at i, 6, 13, 19, 21, 23) – which is not true. The unremarkable reality is that there is found in the CPU a few unobtrusive displays which contain information about the church and certain of its predominantly humanitarian outreaches. *See* JA73-79 (¶¶ 9-11); JA91-114.[1]

Respondents call the church "an arm of the USPS," Opp. at 13, a "unit of the USPS," Opp. at 2, and – no less than 16 times – call the church's CPU "the local post office" or "the post office." Opp. at i, 6, 12, 13, 16, 18, 19, 21, 24, 25, 26. All false.[2] The town of Manchester has a post office located about two and a half miles from the church's CPU. JA964. (Indeed, it was a matter of factual dispute in the district court whether Mr. Cooper had to travel farther from his home to get to the church's CPU than to the Manchester post office. App. 13b-14b.)

Respondents also allude to the purportedly extensive and strict regulation of the church's CPU as a result of the contract between it and the USPS (presumably to imply – contrary to law – a merged identity between the contracting parties). *See* Opp. at i, 3, 12, 24. *But see United States v. Orleans*, 425 U.S. 807, 815 (1976) ("by contract, the Government may fix specific and precise conditions to implement

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[1] Respondents inscrutably object that these displays are not "passive" because some of their text solicits a response from the reader. Opp. at 18. This is no different from any advertisement.

[2] Respondents (Opp. at 4) join the district court below (App. 32b) in failing to mention that the "United States Post Office" sign they describe outside the church's facility also contains the words "contract unit," and is joined by the "Sincerely Yours, Inc." signs and decals identifying the facility. JA181, JA88.

federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal governmental acts"). But that contract is apparently not comprehensive enough for respondents, who seek to add additional requirements to those on which the Postal Service and church have agreed. To respondents' chagrin (and acknowledgment, Opp. at 23 n.12), the contract has nothing to say about the speech of the private CPU operators at their own facility. JA1050.

ARGUMENT IN REPLY

I. RESPONDENTS' "OBJECTION" TO THE CHURCH'S SPEECH IS EVEN FURTHER FROM COGNIZABLE INJURY THAN WAS COOPER'S ASSERTION OF OFFENSE RULED ON BY THE COURT BELOW.

Respondents concede that the original plaintiff Mr. Cooper moved out of town and "in all likelihood" (Opp. at 8) would not again encounter the challenged displays. *See also id.* at ii. Respondents concede the same for intervenor plaintiff Gary Chipman. *Id.* at ii, 8 n.4. Indeed, respondents concede that neither Cooper nor Chipman are any longer proper parties to this litigation. *Id.* at 8 n.4 ("As a result, the respondents are Kimon Karath and Leslie Strong"). The Second Circuit's exclusive focus on Cooper's standing is thus indefensible unless the allegations of the remaining intervenors are in all material respects identical to his. They are not. The intervenors allege only that they encounter and "object" to the religious displays. Unlike Cooper, they thus do not even allege the basics of "offended

observer" standing. (That intervenors "adopted the allegations and claims of the complaint," Opp. at 9, would not change this. "Adopting allegations" that speak of matters personal to Mr. Cooper does nothing other than reiterate allegations about Mr. Cooper, not present new information about the intervenors. Intervenors expressly made their own standing allegations, and the term they chose was "object.")

While an "I object" allegation might include being "offended," as respondents point out, Opp. at 22 n.10, it also includes far, far more. Indeed, if merely seeing and "objecting" gives one Establishment Clause standing, then the requirement of individualized injury is a farce. All one need do is visit the challenged display and state one's objection. This is not "offended observer" standing (an already improper theory of Article III intervention), but the still more expansive "objecting observer" standing. Respondents Karath and Strong – the only ones whose claims are not concededly moot – therefore lack standing.

Even if "objecting observer" standing were equated with "offended observer" standing, this would not be grounds for denying review, but rather for granting it. For it would illustrate how far the lower courts – and especially the court below – have strayed from Article III limits. The Second Circuit concluded that "the *fact of exposure* becomes the basis for injury and jurisdiction" in religious display cases. App. 15a (emphasis added). Respondents assert their injury to be "personal objection to unwelcome [visual] contact" with the church's displays in its CPU. Opp. at 18 n.6. This Court has

never endorsed "objecting observer" standing, but rather has repudiated it in *Valley Forge*.

II. ARTICLE III INJURY STATUS TURNS ON THE NATURE OF THE HARM, NOT THE PROXIMITY TO ITS SOURCE.

Respondents offer that the church's argument "turns on a single statement taken out of context from *Valley Forge*[.]" Opp. at 16. The statement they refer to is that "the psychological consequence presumably produced by an observation of conduct with which one disagrees" does not constitute "injury sufficient to confer standing under Article III." 454 U.S. at 485.

Respondents urge that this restriction in *Valley Forge* only applies to "consequences of conduct *not personally experienced*." Opp. at 17 (emphasis in original). But that is not what *Valley Forge* says. The Court explained that Article III injury does not encompass the psychological consequence of "an *observation* of conduct" that one disagrees with – not of "conduct one did *not* observe" (though that, too, would certainly be disqualified). 454 U.S. at 485. It is the nature of the injury, not the proximity of its provocation, that the Court addresses in *Valley Forge*. *See*, *id.* at 487 n.23 (Court explaining that a party's geographic nearness to the challenged transfer was not its focus, but instead whether the harm alleged is a cognizable "injury").

The Court makes this same point in *Allen v. Wright*, 468 U.S. 737 (1984). "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular

[offended] racial groups[.]" *Id.* at 755-56. That is, if "offended observing" were a cognizable injury under Article III, its consequence would be near-universal standing. This Court has never implied that the same form of "offense" can be a cognizable injury for some, but not others. It either is, or is not, an "injury" under Article III. As in *Valley Forge*, so in *Allen*, the Court said it is not. "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 756 (citation omitted).

III. RESPONDENTS' REMAINING ARGUMENTS IN FAVOR OF THEIR STANDING ARE UNAVAILING.

Respondents note that this Court has on occasion decided on the merits cases that were brought on "offended observer" theories of standing. Opp. at 19-20. This is irrelevant to their claim. The exercise of jurisdiction is not precedent for the existence of jurisdiction. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006). *See also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio").

Respondents also protest that if offended observers cannot sue, then no one can challenge displays that allegedly violate the Establishment Clause. Opp. at 20. But this Court has already rejected precisely that argument. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1984). "This view would convert standing into a requirement that must be observed only when satisfied." *Valley Forge,* 454 U.S. at 489. And even if no one could sue, the political branches remain available for the pursuit of redress.[3]

Respondents repeatedly assert (without citation) that the church argues that standing may only be shown by physical or economic injury. Opp. at 12, 16, 21. The church makes no such claim. Mental injuries (such as those resulting from coercion) certainly may give rise to standing. The church asserts only what this Court stated in *Valley Forge* and *Allen*: the psychological unease accompanying ideological disagreement is not injury for purposes of Article III. That rule implies no further limitation such as respondents suggest.

Finally, as earlier noted, Respondents defend their standing by alleging that patrons "cannot avoid being proselytized" when they visit the CPU. (Opp.

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[3] Respondents' resort to their hypothetical of the church offering "holy communion" to strangers buying stamps (Opp. at 21) is offensive and absurd. It is offensive because it shows a total lack of understanding of what Holy Communion is, and thus is a crude caricature of clergy. And it is absurd because this does not happen, and never would.

at 19.) Assuming that description, the same would be true if the CPU were located next to a church with street-side religious displays or invitations to attend services. Must the courts require a spatial separation of CPUs from neighboring religious institutions? How far must application of this idea of a requisite "religion-free landscape" reach? Would standing lie for challenges to private speech presented adjacent to courthouses and other government buildings? Is not the better course, regarding private displays both outside and inside, to ask the bothered viewers simply to avert their eyes? *See Cohen v. California*, 403 U.S. 15, 21 (1971). Or does profanity enjoy greater protection than religious speech? *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality).

IV. RESPONDENTS LEAVE UNDEFENDED THE LOWER COURT'S HANDLING OF THEIR ESTABLISHMENT CLAUSE CLAIM.

Respondents entirely avoid petitioners' critique of the Second Circuit's method of attributing government status to the church's speech. That court refused to apply the form of analysis that this Court's Establishment Clause case law directs be used for the question at issue here. *See* Pet. at 32. Further, the Second Circuit mishandled even the alien tests it did employ, by both reaching an unmerited conclusion on the status of the church's contract performance, and then in extending that status beyond the reach of its justification – to the church's speech. Pet. at 34-35. It is little wonder

that respondents did not pursue an analytical defense of that methodology.[4]

Respondents instead simply announce that both the district court and court of appeals have classified the church's speech as governmental, and that these conclusions are "correct." Opp. at 25. In support of that opinion respondents merely assert that the church has assumed the role of the USPS. *Id.* This of course begs the very question at issue.

Respondents' position ultimately is that there can be no such thing as a "contract postal unit," but rather all postage sales locations must be federal government post offices for purposes of the Establishment Clause. *See supra* at 4 (noting respondents' repetitive identification of CPU as "the local post office"). If that is the rule, then those CPUs in private residences, religious colleges and bookstores, seminaries, Catholic sisters organizations (*see* Pet. at 3-4), and indeed anywhere else where religious speech is presented at the private postal sales venue, are vulnerable to targeting by offended observers aiming to muzzle the private operators. But the price of such litigation will be to hamper the value of CPUs as an instrument of extending the availability of postal services.

CONCLUSION

This Court should grant review.

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[4] Respondents offer no defense either to the Second Circuit's subsequent failure to abide the boundaries of the *Lemon* test when applying it to the church's speech. Pet. at 35-36.

Respectfully submitted,

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